No. 84-589

In the Supreme Court of the United States

OCTOBER TERM, 1984

PAUL EDMOND DOWLING, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's shipment of "bootleg" record albums containing unauthorized reproductions of performances of copyrighted musical compositions could form the basis for charges of interstate transportation of stolen property, in violation of 18 U.S.C. 2314.

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OPINION BELOW

The opinion of the court of appeals (Pet. Supp. App. A1-A12) is reported at 739 F.2d 1445.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1984. The petition for a writ of certiorari was filed on October 9, 1984, and was granted on January 14, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The National Stolen Property Act, 18 U.S.C. 2314, provides in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

Following a bench trial in the United States District Court for the Central District of California, petitioner was convicted on one count of conspiracy to transport stolen property in interstate commerce and to distribute phonorecords without the consent of copyright proprietors, in violation of 18 U.S.C. 371 (Count One); eight counts of interstate transportation of stolen property, in violation of 18 U.S.C. 2314 (Counts Two through Nine); nine counts of copyright infringement, in violation of 17 U.S.C. 506(a) (Counts Ten through 18); and three counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts 25 through 27) (Pet. Supp. App. A3, A4 n.6, A13; J.A. A2-A13, A47).[1] Petitioner was sentenced to a one-year term of imprisonment on one of the copyright infringement counts (Count Ten) and to a six-month term of imprisonment on the mail fraud counts, to run consecutively to the sentence on Count Ten. The remaining sentences were suspended in favor of a term of five years' probation following the terms of imprisonment, on the condition that petitioner perform 1,500 hours of community service. Petitioner also was fined $5,000 in connection with Counts Two through Nine. Pet. Supp. App. A4; J.A. A48-A49.[2]

[1] Petitioner's case was severed from that of his co-defendants (Pet. Supp. App. A4). Co-defendant William Samuel Theaker pleaded guilty to six counts of the indictment, and co-defendant Richard Minor was convicted on all charges against him following a separate trial. Minor's appeal is now pending before the United States Court of Appeals for the Ninth Circuit.

[2] There appears to be no doubt that Judge Lydick found petitioner guilty on counts of the second superseding indictment (reproduced at J.A. A2-A13) and that the sentencing portion of Judge Real's Judgment and Commitment Order refers to those counts. See Pet. Supp. App. A3-A4, A13; J.A. A47-A49; Pet. Br. 5. However, the portion of the Judgment and Commitment Order that sets forth the finding and judgment (J.A. A48) refers to the first superseding indictment and describes the counts in a manner that does not correspond completely to any of the three indictments. That discrepancy presumably results from a clerical error.

1. The evidence showed that petitioner and his co-defendants successfully conspired to manufacture, transport, and distribute copies of recordings of Elvis Presley vocal performances.[3] Beginning around 1976, petitioner and co-defendant William Samuel Theaker began manufacturing and distributing "bootleg" Elvis Presley phonorecords, *i.e.*, phonorecords made from unreleased Presley recordings, without the consent of RCA Records or the copyright proprietors of the songs performed (Pet. Supp. App. A2).[4] Co-defendant Richard Minor assisted in

[3] The case was tried largely on a stipulated record, including testimony of 30 witnesses and 950 government exhibits. Petitioner testified orally on his own behalf and cross-examined two of the government's witnesses, Aca Anderson and Joan Deary.

"Stiptest." and "Stip." refer to those portions of the stipulated testimony and stipulations of fact submitted to the trial court that are not included in the Joint Appendix. They can be found in the Excerpt of Record filed in the court of appeals. "Tr." refers to the transcript of the Anderson and Deary cross-examination and of petitioner's testimony.

[4] During his professional career, Elvis Presley was under contract to RCA Records and, briefly, to Sun Record Company. Under a 1955 contract between RCA and Presley (extended in 1956 and 1973), RCA acquired the exclusive right to manufacture and distribute sound recordings containing Elvis Presley vocal performances made after November 15, 1955; RCA also acquired the rights under Presley's earlier contract with Sun. RCA's exclusive right remained in effect at the time of the trial in this case. J.A. A36-A37.

Record manufacturers are required by the Copyright Act, 17 U.S.C. 1 *et seq.*, to obtain mechanical licenses and to pay royalties to songwriters and publishing companies when they press records that contain performances of copyrighted musical compositions. 17 U.S.C. 115; J.A. A37. The copyrights for certain songs performed by Elvis Presley are held by various publishing companies, including Elvis Presley Music, Inc., and Gladys Music, Inc. (Stip. re Copyrights, Royalties and Licenses 111-125). The soundtracks of Elvis Presley's movies are protected by motion picture copyrights (J.A. A38-A39). However, most of the recordings of Presley performances (as opposed to the musical compositions performed) were not copyrighted, because the federal copyright statute did not extend protection to sound recordings prior to 1972. Advances in technology and development of the widespread ownership of tape-

manufacture and distribution of the bootleg albums, and Aca "Ace" Anderson assisted petitioner in distributing the albums (J.A. A14-A21).

Petitioner and Theaker manufactured 22 of their own bootleg albums, using material from studio outtakes, soundtracks of Presley motion pictures, tapes of Presley television and concert appearances, and acetates (J.A. A22-A23; Deary Stiptest. 24-47; Anderson Stiptest. 16-18).[5] Each of the 22 bootleg albums included copyrighted

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recording equipment increased the need for copyright protection of sound recordings. In the Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 *et seq.*, Congress provided for copyright protection of sound recordings fixed after February 15, 1972. See *Goldstein* v. *California*, 412 U.S. 546, 551-552 (1973).

The terms "bootleg" and "pirated" are sometimes used interchangeably to refer to unauthorized copying of sound recordings. Within the sound recording industry, however, the two terms have more specific meanings. A pirated recording is an unauthorized copy of a sound recording (whether copyrighted or not) that has been commercially released to the public. A bootleg recording is an unauthorized copy of a performance that has not been commercially released; the latter category includes copies of audience members' recordings of live performances, as well as "outtakes" and other unreleased materials held by recording studios (see note 5, *infra*; Tr. 88). Whether a recording is "bootleg" or "pirated," it may include performances of copyrighted musical compositions. The term "counterfeit" refers to a bootleg or pirated recording accompanied by labels, packaging, and art work that have been duplicated without authorization or that otherwise have been produced in a way that makes them appear genuine. See 18 U.S.C. 2318(b)(1); *United States* v. *Gallant*, 570 F. Supp. 303, 305 n.2 (S.D.N.Y. 1983).

[5] "Outtakes" are portions of tapes not used in a final edited broadcast tape or tapes of performances that are not selected for inclusion in the master tape used to produce a phonorecord authorized for release (Pet. Supp. App. A2 n.1; Tr. 59-61). An "acetate" or "reference lacquer" looks like a phonorecord, but is cut with a stylus, rather than stamped. An acetate can be played like a record, but it wears down after only a few playings. Acetates were used by musicians and record producers before tape recorders were commonly available; they are still used to judge

musical compositions for which neither petitioner nor Theaker, nor any of the entities through which they operated, paid any royalties (Stip. re Copyrights, Royalties and Licenses 111-125; Stip. re Songs on Albums 127-145).

The source material petitioner and Theaker used to produce their bootleg albums was acquired by various illicit methods. For example, petitioner told Anderson that Theaker had paid an employee of Radio Recorders $500 per tape for enough Presley tapes to make several long playing records and boxed sets (Anderson Stiptest. 15, 18; Tr. 79, 81).[6] Petitioner and Theaker also obtained materials stolen from RCA archives. Among materials Anderson retained, despite petitioner's instruction to destroy them, was a box containing the master tape used to produce the bootleg album "The Legend Lives On," on which petitioner had written "RCA Stolen Tapes." Anderson Stiptest. 10, 11; Deary Stiptest, 37-39; Tr. 111-112.[7] Theaker paid an NBC employee $20,000 for access to NBC's tapes of Presley television programs (J.A. A42-A43; Anderson Stiptest. 18-19; Tr. 84-85, 134, 137-138).

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how a performance is likely to sound on a phonorecord. J.A. A44; Tr. 67.

Petitioner and Theaker also manufactured and distributed so-called "junk LP's." These were approximately 50 bootleg records that originally had been distributed by other individuals and that petitioner and Theaker copied and advertised in their own catalogs (J.A. A20-A21).

[6] Presley recorded the soundtracks for most of his motion pictures at Radio Recorders, a Hollywood recording studio. Neither Radio Recorders nor any of its employees was authorized to release master recordings or the outtakes that were produced during Presley's recording sessions, except to the motion picture studios that were its clients. Radio Recorders was authorized to release to RCA tapes of songs Presley sang for the MGM movie "Viva Las Vegas;" otherwise, all tapes were to be delivered to the clients without copying. J.A. A22, A34, A39, A46; Tr. 63-64.

[7] The original sources for the stolen tapes were an eight-track RCA master tape recorded in Las Vegas and RCA 16-track tapes. No one at RCA was authorized to release the tapes. J.A. A23.

Petitioner acquired some source material by concealing or misrepresenting the purpose for which he planned to use it. For example, petitioner borrowed from John Herman, a Presley fan, a tape Herman had made of a 1976 New Year's Eve performance given by Elvis Presley in Pittsburgh and pictures Herman had taken at the concert. Although Herman informed Theaker that he did not want the materials copied, petitioner and Theaker used the tape and some of the photographs to make early pressings of the bootleg album "Rockin' With Elvis, New Year's Eve" and an album cover. Herman testified that he would not have loaned petitioner the materials had he known that petitioner and Theaker intended to use them to make an album. J.A. A16, A34-A36.[8]

Most of the bootleg albums were manufactured on the West Coast.[9] Beginning in early 1979, Theaker and petitioner arranged to have many of these albums shipped by truck from California to Maryland, where petitioner resided, because they believed that the FBI was investigating Theaker's West Coast operation. J.A. A17. Each

[8] In addition, in 1979 petitioner purchased an acetate of the copyrighted song "Plantation Rock" from one of its authors, Harvey Zimmerman. Petitioner told Zimmerman that he intended to play the acetate once and then mount it on his wall with special lighting; however, petitioner previously had told Anderson that if he were able to purchase the acetate from Zimmerman, he would use it to manufacture a record. Theaker eventually used the acetate in making the bootleg album "Plantation Rock." J.A. A43-A45; Anderson Stiptest. 14. Zimmerman testified that he would not have sold petitioner the "Plantation Rock" acetate if he had known it would be used to make a record (J.A. A45). While the "Plantation Rock" album was not included in the shipments that are the subject of the interstate transportation of stolen property charges in this case, petitioner's conduct is illustrative of the manner in which he and Theaker obtained some source materials.

[9] From early 1976 until early 1980, a Burbank, California record pressing company manufactured bootleg Presley albums for petitioner and Theaker (Waddell Stiptest. 96-97, 100). In early 1980, when the Burbank firm refused to press more records for them, petitioner and Theaker arranged to have co-defendant Minor manufacture some of the bootleg albums in Florida (J.A. A20-A21).

shipment included thousands of albums (*id.* at A24-A33, A39-A42). Eight of the shipments formed the basis for the eight counts of interstate transportation of stolen property at issue in this case. Based on the list prices for which they eventually sold, the albums transported in the eight shipments had a value of approximately $661,000. See J.A. A25-A33; Tr. 16-17.

During 1979 and 1980, at petitioner's and Theaker's direction, Send Service, a labeling and mailing service, mailed catalogs listing the bootleg albums to customers throughout the United States. Theaker collected the customers' orders through post office boxes in Glendale, California, and Los Angeles. He then sent the orders to petitioner, who mailed the bootleg albums from Maryland. Pet. Supp. App. A2.

The mail order business petitioner and Theaker operated was massive in scope. In the six to eight weeks following Elvis Presley's death in August 1977, the business received and filled between 250 and 300 orders per day. Petitioner told Anderson that the proceeds of these sales alone would allow petitioner and Theaker to live comfortably for the rest of their lives. J.A. A16. During 1979, Send Service mailed over 50,000 catalogs advertising the bootleg albums (Pet. Supp. App. A2). Each week during 1979-1980, petitioner mailed hundreds of packages, ranging from one-record mailings to packages weighing 20 to 30 pounds each; his postal bills were at least $1,000 per week. *Ibid.* During this period petitioner was aware that Elvis Presley had been under exclusive contract with RCA, that the material petitioner and his co-defendants were reproducing included copyrighted compositions, and that manufacture and distribution of the bootleg albums were illegal (J.A. A16-A17, A19-A20, A38; Anderson Stiptest. 11, 13, 15; Deary Stiptest. 31, 33-35, 37, 41-47).

2. The court of appeals affirmed petitioner's convictions (Pet. Supp. App. A1-A12). Relying on its decision in *United States* v. *Belmont*, 715 F.2d 459 (9th Cir. 1983), cert. denied, No. 83-769 (Feb. 21, 1984) and No.

83-1445 (May 29, 1984), the court rejected petitioner's claim that the government was limited to prosecuting him under the Copyright Act, 17 U.S.C. 506(a), and was therefore barred from prosecuting him for mail fraud and for interstate transportation of stolen property in connection with his bootleg record operation (Pet. Supp. App. A5-A6, A10-A11). The court concluded that the Piracy and Counterfeiting Amendments Act of 1982, 18 U.S.C. 2319, which explicitly provides that its penalties are in addition to those of Title 17 "or any other law," indicated that Congress did not intend the Copyright Act to constitute the exclusive penalty for persons who infringe copyrights (Pet. Supp. App. A6).[10]

SUMMARY OF ARGUMENT

A. The language of 18 U.S.C. 2314 encompasses petitioner's shipment of "bootleg" record albums containing unauthorized reproductions of performances of copyrighted musical compositions. Section 2314 imposes penalties on anyone who "transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud." Petitioner transported "goods, wares, [or] merchandise" worth more than $5,000, *i.e.*, the bootleg albums. Those albums were "stolen, converted or taken by fraud" in two respects. The recordings containing the sounds that

[10] The court of appeals further held that, for purposes of the mail fraud statute, 18 U.S.C. 1341, a scheme to defraud may be premised on nondisclosure in violation of an independent explicit statutory duty (Pet. Supp. App. A6-A9). Since petitioner conceded that the Copyright Act, 17 U.S.C. 115, created a statutory duty to report to RCA his intent to manufacture and distribute Elvis Presley recordings, the court concluded that petitioner's failure to contact RCA could form the basis for a scheme to defraud under Section 1341 (Pet. Supp. App. A8). The court of appeals also rejected petitioner's contentions that mailings of the catalogs advertising the bootleg albums were not in furtherance of the mail fraud scheme (*id.* at A9-A10) and that the testimony of an RCA employee should not have been admitted under the co-conspirator exception to the hearsay rule (*id.* at A10-A11).

were transferred onto the bootleg albums were stolen from their custodians; in addition, petitioner and his co-defendants directed the transfer of sounds onto the albums without authorization from those who had copyright and other forms of property interests in the recordings. Petitioner should not be permitted to escape Section 2314 penalties simply because the sounds were transferred from one physical object (a stolen tape) to others (bootleg phonorecords) before shipment in interstate commerce.

Petitioner's contention that a copyright does not constitute "goods, wares, [or] merchandise" is beside the point; no one is alleging that petitioner transported a copyright across state lines. And any claim that the transported albums were not covered by Section 2314 because their value derived primarily from intangible sounds is without merit. There is no indication that Congress intended the words "goods, wares, [and] merchandise" to exclude property with an intangible component; rather, the focus of the statutory terms is on the commercial character of an item. Property that has a significant intangible component, like the bootleg record albums in this case—or, for that matter, a Rembrandt painting—clearly can constitute a subject of commerce.

Petitioner's claim that the transported bootleg albums were not "stolen, converted or taken by fraud" also is without merit. In this case the evidence showed that there were thefts or fraudulent takings of the tapes that were duplicated in order to produce the albums. Whatever the Court might conclude with respect to our argument that the property interest reflected in a copyright is stolen or converted by the manufacture of unauthorized copies, Section 2314 is surely violated when, as here, the copied materials are themselves obtained by theft.

But even if there had been no initial theft of tangible items, the unauthorized duplication of sounds would be grounds for characterizing the bootleg albums as "stolen,

converted or taken by fraud." In using those broad terms, Congress referred comprehensively to many sorts of misappropriation of property. Since copyright proprietors and others who have invested resources in a recording of a musical performance have property interests in connection with that recording, unauthorized copying constitutes misappropriation and renders the duplicates "stolen, converted or taken by fraud" within the meaning of Section 2314.

B. Interpretation of Section 2314 to cover interstate shipments of bootleg record albums is consistent with legislative intent. The history of both the National Motor Vehicle Theft Act, now 18 U.S.C. 2312, and the National Stolen Property Act, now Section 2314, shows that Congress was concerned with halting the activities of gangsters who were engaged in extensive interstate movements of stolen property in order to escape the jurisdiction of state authorities. In view of the major role played by organized crime in the interstate transportation of unauthorized copies of sound recordings, and the significant effect of such activities on the entertainment industry, it is most unlikely that a Congress addressing those concerns would have chosen to exclude such operations from the scope of Section 2314.

Recent amendments to the federal copyright statute do not suggest that Congress viewed transportation of copyright infringing duplicates as outside the scope of Section 2314. Congress's addition of felony penalties for copyright infringement in 1982 in no way indicates a belief that those who engaged in unauthorized reproduction or distribution of infringing materials could not be prosecuted for the separate offense of interstate transportation of stolen property. In fact, after having been advised that prosecutors were charging record and tape pirates with violations of Section 2314, Congress provided explicitly that the penalties for copyright infringement set by the 1982 amendments were to be in addition to those under "any other law."

C. The fact that petitioner's bootlegging operation encompassed significant copyright infringing activities does

not immunize him from prosecution under Section 2314 for his interstate shipment of the bootleg albums. The criminal copyright provisions and Section 2314 are aimed at very different types of conduct. Here the copyright infringement counts against petitioner were based on sales of several bootleg albums to two individual customers in California, while the Section 2314 counts were based on petitioner's truck shipments of thousands of the albums from the West Coast to the East Coast prior to distribution to individual customers. Congress surely did not intend that an individual who participates in the interstate shipment stage of a bootlegging operation should escape Section 2314 penalties simply because copyright infringing activities may have occurred at a different stage of the operation.

ARGUMENT

PETITIONER WAS PROPERLY CHARGED WITH INTERSTATE TRANSPORTATION OF STOLEN PROPERTY, IN VIOLATION OF 18 U.S.C. 2314, BASED ON HIS SHIPMENT OF "BOOTLEG" RECORD ALBUMS CONTAINING UNAUTHORIZED REPRODUCTIONS OF PERFORMANCES OF COPYRIGHTED MUSICAL COMPOSITIONS

The question presented by this case is whether petitioner's shipment of "bootleg" record albums containing unauthorized reproductions of performances of copyrighted musical compositions could form the basis for charges of interstate transportation of stolen property, in violation of 18 U.S.C. 2314.[11] The charges against petitioner stemmed from his participation in an extensive commercial operation involving a series of steps. First, petitioner and his co-defendants obtained, by means of theft or fraud, unreleased ~~records~~ (record. su of Elvis Presley performances, including performances of various copyrighted musical compositions. Next, working primarily on the West Coast, they arranged for duplication of those illicitly acquired materials and production of a series of bootleg

[11] The Court's grant of certiorari was limited to the first question presented by the petition.

record albums. Petitioner then arranged for shipment of the bootleg albums by truck from California to Maryland, where petitioner resided, or, in several instances, to Florida, where co-defendant Minor worked. Petitioner and his co-defendants advertised the albums nationwide. Petitioner filled customer orders, mailing hundreds of albums from Maryland each week. See pages 3-7, *supra*.

Like other commercial operations involving bootleg or pirated copies of sound recordings or motion pictures, petitioner's operation yielded considerable commercial gain to those who directed it, and at the same time involved significant commercial losses by others.[12] Petitioner and his co-defendants paid no royalties to the pub-

[12] The Senate Judiciary Committee in 1981 described the financial gains, and the corresponding losses, involved in large-scale production of unauthorized copies of sound recordings and audiovisual works:

> Piracy and counterfeiting of audio and audiovisual products have grown rapidly in recent years, developing into a highly sophisticated, billion-dollar-a-year business. * * * [A] counterfeiting ring discovered in 1977, was producing and disseminating more than 25 million counterfeit records a year, at an annual profit of more than $30 million.
>
> * * * * *
>
> The financial loss to the film and recording industries is significant. An estimated $600 million a year is diverted from the recording industry. The impact on the film industry is probably of similar magnitude. Piracy and counterfeiting of films and recordings affect almost every aspect of those industries. Recording artists, actors, and actresses lose significant amounts in royalties and fees from such activities. Musicians are denied certain income they receive based on the number of records sold. The earnings of composers and publishers are adversely affected by illicit sales of records and tapes. Moreover, piracy and counterfeiting activities drain income needed by the film and recording industries to assume the risk involved in investing in new films and recordings and in developing new talent.

S. Rep. 97-274, 97th Cong., 1st Sess. 3-5 (1981) (footnotes omitted). See also *Goldstein* v. *California*, 412 U.S. 546, 549-550 & n.5 (1973); *Tape Industries Ass'n of America* v. *Younger*, 316 F. Supp. 340, 342-344 (C.D. Cal. 1970), appeal dismissed, 401 U.S. 902 (1971).

lishers of the copyrighted songs included on the bootleg albums or to MGM, the owner of the copyrights on the movie soundtracks from which some of the albums were duplicated. Nor did petitioner and his co-defendants make any payments to RCA, which had acquired from Presley the exclusive right to manufacture and distribute recordings of Presley performances. Petitioner's sale of the thousands of bootleg albums necessarily diminished the commercial opportunities available to all who participated in the production and sale of legitimate Presley recordings, including Elvis Presley himself (and his estate after his death in 1977), copyright proprietors, RCA, wholesalers, and retailers.

The eight Section 2314 counts on which petitioner was convicted (J.A. A6-A8) were based on one stage of the operation—petitioner's eight truck shipments of bootleg albums from California to Maryland or Florida prior to their distribution to customers. Each of these shipments included thousands of albums; the total value of each shipment (based on the advertised list prices) ranged from $40,000 to $157,000. See *id.* at A24-A33.

Petitioner contends in his opening brief that these shipments may not form the basis for charges of interstate transportation of stolen property, in violation of Section 2314, and that the government was confined to prosecuting him for misdemeanor copyright violations based on his participation in other stages of the operation. The court of appeals rejected petitioner's claim, citing its decision in *United States* v. *Belmont*, *supra*, a case involving interstate transportation of unauthorized videotape cassettes made by duplicating copyrighted motion pictures.[13] The Eleventh and District of Columbia

[13] Before *Belmont*, the Ninth Circuit had held on several occasions that interstate transportation of unauthorized duplicates of copyrighted material could form the basis for Section 2314 charges. See *United States* v. *Atherton*, 561 F.2d 747, 752 (9th Cir. 1977) (motion pictures); *United States* v. *Drebin*, 557 F.2d 1316, 1332 (9th Cir. 1977), cert. denied, 436 U.S. 904 (1978) (motion pictures). Cf. *United States* v. *Wise*, 550 F.2d 1180, 1183 & n.3 (9th Cir.), cert. denied, 434 U.S. 929 (1977) (motion for acquittal

Circuits likewise have concluded that interstate transportation of unauthorized duplicates of copyrighted materials may violate Section 2314. *United States* v. *Drum*, 733 F.2d 1503, 1505-1506 (11th Cir. 1984), cert. denied, Nos. 84-328, 84-5163, 84-5219, and 84-5319 (Nov. 26, 1984) (sound recordings); *United States* v. *Gottesman*, 724 F.2d 1517, 1519-1521 (11th Cir. 1984) (motion pictures), citing *United States* v. *Gottesman*, 685 F.2d 1387 (11th Cir. 1982) (Table), cert. denied, 460 U.S. 1014 (1983) (motion pictures); *United States* v. *Whetzel*, 589 F.2d 707, 710 n.10 (D.C. Cir. 1978) (sound recordings). See also *United States* v. *Gallant*, 570 F. Supp. 303, 310-314 (S.D.N.Y. 1983) (sound recordings); *United States* v. *Sam Goody, Inc.*, 506 F. Supp. 380, 385-391 (E.D.N.Y. 1981) (sound recordings). The Seventh Circuit has assumed the application of Section 2314 in a case involving transportation of sound recordings. *United States* v. *Berkwitt*, 619 F.2d 649, 656-658 (1980).

Only the Fifth Circuit, in a case involving off-the-air recording of motion pictures, with subsequent manufacture and shipment of unauthorized copies, has concluded that interstate transportation of unauthorized duplicates of copyrighted material is outside the scope of Section 2314. See *United States* v. *Smith*, 686 F.2d 234 (1982). In his opening brief, petitioner relies heavily on the reasoning of *Smith*. But the *Smith* court's analysis of the language and history of Section 2314 is faulty. A proper analysis of the statutory language and legislative history and of petitioner's conduct in this case shows that petitioner was correctly charged with interstate transportation of stolen property. Petitioner's reading of Section 2314 would immunize from the coverage of that provision a significant class of interstate shipments of illicitly acquired property that can yield enormous commercial gains to the participants—a result wholly contrary to the intent of Congress.

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granted on Section 2314 counts because of government's failure to prove jurisdictional requirement that transported motion picture prints had a value of $5,000 or more).

A. The Language of Section 2314 Encompasses Interstate Shipments of Bootleg Record Albums

The starting point for interpretation of a statute is the language of the statute itself. *United States* v. *Turkette*, 452 U.S. 576, 580 (1981); *Lewis* v. *United States*, 445 U.S. 55, 60 (1980). Section 2314 imposes penalties on, inter alia, anyone who "transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud."

1. Applying a common sense reading of the statute, there can be no doubt that petitioner's shipments of the bootleg record albums from the West Coast to the East Coast fit within the language of Section 2314. Petitioner unquestionably caused the interstate transportation of "goods, wares, [or] merchandise," *i.e.*, the bootleg albums. Petitioner does not dispute that he caused the eight interstate shipments of albums described in the indictment; the testimony to which he stipulated summarizes information from the trucking company bills of lading issued in connection with those shipments (see J.A. A24-A33). Petitioner also does not deny that each of the shipments had a value of $5,000 or more.

Moreover, the bootleg albums that petitioner shipped are properly characterized as "stolen, converted or taken by fraud." Of course, the records themselves (*i.e.*, the physical objects) were not stolen from others; rather, they were manufactured at the direction of petitioner and his co-defendants. But there were clearly thefts, conversions, and fraudulent takings of the tapes or acetates that contained the sounds that were transferred onto the bootleg albums. For example, the outtakes of Presley studio performances and soundtracks of Presley motion pictures were removed from company vaults without authorization; co-defendant Theaker paid a bribe of $20,000 to an NBC employee in order to obtain tapes of Presley television performances that were not authorized for release; and petitioner himself obtained a tape of a Presley

concert by making misrepresentations to the owner. See pages 5-6, *supra*. In addition, petitioner and his co-defendants directed the transfer of sounds from these illicitly obtained recordings onto the bootleg albums without authorization from those who had copyright and other forms of property interests in the recordings. There was ample evidence that petitioner knew that the Presley materials used to produce the bootleg albums had been stolen from RCA and other sources.[14] Petitioner also was aware that unauthorized copying and distribution of the Presley recordings violated the exclusive rights of, inter alia, the composition copyright owners and RCA, which owned the exclusive right to manufacture and distribute Presley sound recordings.[15]

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[14] For example, petitioner wrote "RCA Stolen Tapes" on a box containing the master tape used to produce the bootleg album "The Legend Lives On" (Anderson Stiptest. 11; Deary Stiptest. 37-39; Tr. 111-112). Aca "Ace" Anderson testified that petitioner told him that co-defendant Theaker had paid a $20,000 bribe to an NBC employee to obtain Presley tapes and had paid $500 per Presley tape to a Radio Recorders employee (Anderson Stiptest. 18-19). Anderson also testified that he was told by petitioner and Theaker that they were wary of any unusually large record orders, because they could be charged with interstate transportation of stolen property if they shipped more than $5,000 worth of records (J.A. A19-A20). Petitioner, Theaker, and Anderson met with Theaker's attorney in Los Angeles to discuss whether they should continue to manufacture the bootleg albums and possible defenses to a criminal prosecution. Anderson testified that petitioner and Theaker stated that they would continue to manufacture the records and that if they were prosecuted they could claim they believed that anyone could manufacture Presley records after his death. J.A. A19. The record includes correspondence from Theaker to petitioner addressed "Hi, Pirate;" on one occasion, Theaker wrote to petitioner, "Pirate baby, we're either going to get (1) real big, (2) busted, or (3) make nice albums and no money." Anderson Stiptest. 13; GX 181, 185, 191.

[15] Anderson testified that in 1977 petitioner told him that only RCA was authorized to produce records of Elvis Presley's singing (J.A. A16). On another occasion, petitioner told Anderson that the tapes acquired from Radio Recorders contained so many songs by Harvey Zimmerman (see *id.* at A43) that if petitioner and Theaker were paying the required royalties, Zimmerman would receive an amount equal to what he already was receiving from RCA (Anderson Stiptest. 15). At trial, petitioner did not contest the copyright infringement charges against him (Tr. 33).

The only arguable response to this analysis is that the physical objects transported over state lines (*i.e.*, the bootleg albums) were not technically "the same" physical objects that were removed from the possession of RCA and the other custodians of the Presley recordings. It was the intangible sounds, or performances, that were the real object of the theft. Those sounds were duplicated from the original stolen objects onto different physical objects (the vinyl of the bootleg albums); it was these duplicates that moved over state lines.

We think it clear, however, that the transcription of sounds from one physical object to another should not make a difference for purposes of Section 2314. So far as we are aware, there has never been any suggestion that altering a physical object (*e.g.*, repainting stolen cargo or removing identifying labels) before it is transported in interstate commerce would allow a defendant to escape Section 2314 penalties, on the theory that the item transported was not precisely "the same" as the item stolen. See, *e.g.*, *United States* v. *Moore*, 571 F.2d 154, 158 (3d Cir.), cert. denied, 435 U.S. 956 (1978) (for purposes of Section 2314, counterfeit printed Ticketron tickets transported in interstate commerce were "the same" property as blank Ticketron tickets that were stolen); *United States* v. *Gallant*, 570 F. Supp. at 311 n.10 ("Nearly every court considering an indictment under § 2314 has not read the words 'the same' to require literally that what is transported be in exactly the same form as what was stolen."). In a case like this one, the physical form of the stolen items is secondary to the sounds that are recorded on them. In these circumstances, a defendant should not be permitted to escape the penalties of Section 2314 by the transfer of the sounds from one physical object to a different physical object that was never possessed by the original owner.

That is particularly so in the case of an individual like petitioner, who was well aware of the criminal nature of both the taking of the original object and the unauthorized copying of sounds.

Even before the record and motion picture piracy cases, the lower courts had held that Section 2314 applies where a defendant has transported a duplicate, rather than the original stolen object. In *United States* v. *Lester*, 282 F.2d 750, 755 (3d Cir. 1960), cert. denied, 364 U.S. 937 (1961), the court rejected the claim that interstate transportation of photostatic copies of stolen geophysical maps did not fall within Section 2314 because the copies were not stolen property. The court noted that the defendant himself had acknowledged that it was the idea, rather than its material paper embodiment, that was valuable.

In *United States* v. *Bottone*, 365 F.2d 389 (2d Cir.), cert. denied, 385 U.S. 974 (1966), the court considered a scheme involving the theft, copying, and transportation of trade secret materials. Documents describing a manufacturing process for improved strains of microorganisms used to produce certain antibiotics had been removed from a company's file in New York, copied, and returned to company files. The copies were then transported to New Jersey, and subsequently to Italy. Judge Friendly, writing for the court, had no difficulty concluding that papers describing manufacturing procedures constituted "goods, wares, [or] merchandise" within the meaning of Section 2314. 365 F.2d at 393. He viewed as a more serious question whether the papers that were transported constituted goods that had been "stolen, converted or taken by fraud." Judge Friendly concluded, however, that it should not make a difference that intangible information had been "transformed and embodied in a different physical object." *Ibid.* "In such a case," he wrote, "when the physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers into a tangible object never possessed by the original owner should be deemed immaterial. It

would offend common sense to hold that these defendants fall outside the statute simply because, in efforts to avoid detection, their confederates were at pains to restore the original papers to Lederle's files and transport only copies or notes, although an oversight would have brought them within it." *Id.* at 393-394.

In this case, it is musical sounds, rather than trade secret information, that constitute the intangible component of the stolen items. But the principle expressed in *Lester* and *Bottone*—that transfer of intangible intellectual property from one physical object to another should not allow a defendant to escape Section 2314 penalties—applies equally to this case.

2. Petitioner contends (Br. 21-26) that his conduct is not covered by the terms of Section 2314 because a copyright does not constitute "goods, wares, [or] merchandise" within the meaning of the statute. But neither the government nor the court of appeals has suggested that petitioner transported copyrights across state lines.[16] The indictment charges that petitioner transported in interstate commerce "phonorecords * * * containing Elvis Presley performances of copyrighted musical compositions" (J.A. A6, A8). The court of appeals likewise referred to petitioner's shipment of "bootleg phonorecords," or "phonorecords of copyrighted material" (Pet. Supp. App. A10).

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[16] The Fifth Circuit in *United States* v. *Smith*, 686 F.2d at 239-241, similarly erred when it focused on copyrights, rather than on the videotape cassettes that were transported, in analyzing whether that case involved "goods, wares, [or] merchandise."

The existence of a copyright or other proprietary interest in a recording of a musical performance or in a musical composition may cause the unauthorized copying of musical sounds to constitute theft or conversion. See pages 28-34, *infra*. But it is not the copyright itself that is transported over state lines; rather, it is the unauthorized copies. See *United States* v. *Whetzel*, 589 F.2d at 710 (the defendant "was not transporting the right to produce legitimate tapes," but rather unauthorized tapes of copyrighted sound recordings). More generally, when any item is stolen and transported in interstate commerce, it is not the owner's possessory interest that is transported, but rather the item itself.

Petitioner asserts more generally that "the common or usual meaning of the phrase 'goods, wares, and merchandise' encompasses tangible identifiable items, not intangible incorporeal property rights" (Pet. Br. 23-24). Petitioner may be suggesting that a record album should not be regarded as "goods, wares, [or] merchandise" if its value derives primarily from intangible sounds that are protected by some form of artistic property right, rather than from the physical material on which the sounds are recorded. That contention cannot be squared with the cases in which courts have concluded that items with significant intangible components, such as geophysical maps and papers bearing trade secret information, qualify as "goods, wares, [or] merchandise" within the meaning of Section 2314. See *United States* v. *Greenwald*, 479 F.2d 320 (6th Cir.), cert. denied, 414 U.S. 854 (1973); *United States* v. *Bottone, supra*; *United States* v. *Lester, supra*; *United States* v. *Seagraves*, 265 F.2d 876 (3d Cir. 1959). In any event, the language of Section 2314 provides no support for such a contention.

Nothing on the face of Section 2314 distinguishes among different types of property depending on whether they have an intangible component. Congress's listing of terms—"goods, wares, merchandise, securities or money"—suggests that it intended to sweep broadly. The original title Congress gave to the statute—the National Stolen Property Act—supports that suggestion. Use of the general term "property" in the title is evidence that Congress meant the listing of terms in the text to constitute a comprehensive listing that would include both tangibles and intangibles. See *Brotherhood of Railroad Trainmen* v. *Baltimore & O. R.R.*, 331 U.S. 519, 529 (1947). The modern legal understanding of the term "property" clearly embraces even those interests that are entirely intangible.

> Property is a term of broad significance, embracing everything that has exchangeable value, and every interest or estate which the law regards of sufficient value for judicial recognition. The word may be

> properly used to signify any valuable right or interest protected by law. * * *
>
> The term * * * extends to every species of valuable right and interest, including real and personal property, easements, franchises and other incorporeal hereditaments.
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> * * * * *
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> The term has a very broad meaning, and when used without qualification, either express or implied, it may reasonably be construed to include obligations, rights and other intangibles as well as personal things.

1 G. Thompson, *Commentaries on the Law of Modern Real Property* § 5, at 25-26, 29-30 (1980 repl.) (footnotes omitted). Of course, property that is the subject of Section 2314 normally will have some tangible aspect, since by definition it is transported in interstate commerce.[17] But in the absence of any express limitation, there is no reason to distinguish among transported items on the basis of whether their value derives primarily from the tangible object itself or from an intangible component, such as music recorded in magnetic signals or trade secret information embodied in writing.[18]

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[17] Petitioner quotes the statement of the court in *United States* v. *Bottone*, 365 F.2d at 393, that "where no tangible objects were ever taken or transported, a court would be hard pressed to conclude that 'goods' had been stolen and transported within the meaning of § 2314." Pet. Br. 25. In this case, however, tangible objects were both taken and transported. The facts of this case thus are quite different from the hypothetical situation to which the *Bottone* court referred in connection with this passage, in which an individual would memorize a chemical formula, travel across state lines, and write down the information in a different state.

[18] If petitioner or his cohorts had broken into an RCA warehouse and stolen records whose physical components were worth less than $5,000 but whose market value was greater because of the value of the sounds they would produce—an intangible component of value—no one could seriously contend that subsequent interstate shipment of the stolen records did not come within Section 2314 on the ground that almost the entire value of such goods came from their intangible component.

The lower courts have correctly recognized that the real focus of the terms "goods, wares, [and] merchandise" is not on the tangible or intangible source of value of transported items, but on their commercial nature. In particular, the terms "wares" and "merchandise" suggest items that may be bought and sold. "The terms 'goods, wares, merchandise' is [sic] a general and comprehensive designation of such personal property or chattels as are ordinarily a subject of commerce." *United States* v. *Seagraves*, 265 F.2d at 880. Accord, *American Cyanamid Co.* v. *Sharff*, 309 F.2d 790, 796 (3d Cir. 1962); *United States* v. *Sam Goody, Inc.*, 506 F. Supp. at 388 (on their face, the terms "goods, wares, [and] merchandise" "appear to have been intended to extend broadly to all types of property likely to move in commerce, with no distinction between items of a completely tangible character and items of a mixed tangible-intangible character"). See also *In re Vericker*, 446 F.2d 244, 248 (2d Cir. 1971).[19]

Property that has a significant intangible component—*e.g.*, trade secrets, or intellectual or artistic property—unquestionably may have commercial value and may constitute a subject of trade. See, *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 12-15 (trade secrets); *International News Service* v. *Associated Press*, 248 U.S. 215 (1918) (news gathered by news agency).[20] Indeed, in *International News Service*

[19] The statutory concern with items of a commercial nature is emphasized by the requirement that the items transported have "value," a concept that ordinarily refers to worth in a commercial context. See 18 U.S.C. 2311 ("[v]alue" means the "face, par, or market value * * *"); see also *United States v. Berkwitt*, 619 F.2d at 656-658; *United States* v. *Sam Goody, Inc.*, 506 F. Supp. at 388.

[20] In *Monsanto*, this Court held that health, safety and environmental data cognizable as trade secrets under state law constituted property for purposes of the Taking Clause of the Fifth Amendment, despite the intangible nature of such data. The Court explained that trade secrets have many of the characteristics of more tangible forms of property; for example, such secrets are assignable, they can form the *res* of a trust, and they can pass to a

the Court specifically referred to news matter gathered by an agency as "goods" and "merchandise." *Id.* at 236, 242; see note 20, *supra*. This Court has specifically recognized the commercial value of tapes and records containing musical performances by popular artists and the significance of pirated records and tapes in the recording industry. See *Goldstein* v. *California*, 412 U.S. 546, 549-550, 571 (1973). See also page 12 note 12, *supra*; *United States* v. *Sam Goody, Inc.*, 506 F. Supp. at 388 ("[c]ounterfeit tapes are able to be moved, marketed, sold, and traded, both within the industry and between the industry and the public"). The evidence in this case shows that the bootleg albums shipped by petitioner had commercial value amounting to hundreds of thousands of dollars and were the subject of vigorous trade through the mail order business conducted by petitioner and his co-defendants. See pages 6-7, *supra*.

Petitioner cites (Br. 24) the Fifth Circuit's discussion of dictionary definitions in *United States* v. *Smith*, *supra*, in support of his contention that Section 2314 refers only to tangible goods. The court in *Smith* found it significant (686 F.2d at 240) that the phrase "goods, wares, and merchandise" is defined in *Black's Law Dictionary* 624 (5th ed. 1979) as "[a] general and comprehensive des-

trustee in bankruptcy (slip op. 13-14). The Court also noted that Congress had perceived that data developers have a proprietary interest in their data and that "[t]his general perception of trade secrets as property is consonant with a notion of 'property' that extends beyond land and tangible goods and includes the products of an individual's 'labour and invention'" (*id.* at 14, quoting 2 W. Blackstone, *Commentaries* *405).

In *International News Service*, the Court concluded that news matter was the subject of sale and must be regarded as quasi property, at least as between competitors. The Court noted that news matter "is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise." 248 U.S. at 236. The Court concluded that a news agency that used a competitor's news matter in its own service was engaged in misappropriation in "sell[ing] complainant's goods as its own." *Id.* at 242.

ignation of such chattels and goods as are ordinarily the subject of traffic and sale;" the term "chattel" is defined as "[a]n article of personal property, as opposed to real property" (*id.* at 215); and the term "goods" is defined in one sense as "every species of personal property" and in another sense as "all tangible items" (*id.* at 624).

The definitions cited by the *Smith* court confirm that the terms "goods, wares, [and] merchandise" refer to property that normally is the subject of commerce.[21] But contrary to the *Smith* court's conclusion, the definitions do not suggest any limitation to tangible items. The term "personal property," used in the definitions of "chattels" and "goods," in turn is described as "divisible into (1) corporeal personal property, which includes movable and tangible things * * * and (2) incorporeal personal property, which consists of such rights as personal annuities, stocks, shares, patents, and copyrights." *Black's Law Dictionary, supra,* at 1096.[22] The dictionary definition approach therefore does not support the conclusion for which petitioner contends, but rather the common sense view that Section 2314 covers transportation of items that include both tangible and intangible components, such as bootleg record albums.[23]

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[21] See also the definition of "merchandise": "All goods which merchants usually buy and sell, whether at wholesale or retail; wares and commodities such as are ordinarily the objects of trade and commerce." *Black's Law Dictionary, supra,* at 890.

[22] Dictionary definitions thus contradict even petitioner's straw man contention (see page 19, *supra*) that a copyright could not come within the phrase "goods, wares, [or] merchandise."

[23] Petitioner's attempt to isolate the intangible components of the bootleg albums for purposes of the "goods, wares, [or] merchandise" inquiry is inconsistent with reality. "The instrumentality of commercial revenue is the entire entity—the sounds plus the medium of embodiment * * * once [record] and sounds are joined the resulting product is a single entity." *United States* v. *Sam Goody, Inc.*, 506 F. Supp. at 388. Indeed, it could be said that "the intangible idea protected by the copyright is effectively made tangible by its embodiment upon the [records]." *United States* v. *Gottesman*, 724 F.2d at 1519-1521.

3. Petitioner further contends (Br. 26-32) that nothing he transported was "stolen, converted or taken by fraud" within the meaning of Section 2314. In a variation on his contention concerning the terms "goods, wares, [and] merchandise," he asserts that only tangible objects can be stolen or converted and that copyright infringement may not be equated with stealing or conversion.

At the outset, it should be noted that the wrongful takings in this case entailed far more than copyright infringement.[24] The various tapes and acetates that contained the sounds transferred to the bootleg albums were either stolen (*e.g.*, from RCA vaults) or taken by fraud (*e.g.*, from the owner of the Pittsburgh New Year's Eve concert tape, who was deceived by the misrepresentation that petitioner intended to use the tape only for noncommercial purposes). See pages 5-6, *supra*.[25] As we ex-

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[24] The indictment alleges that the bootleg albums were stolen, converted, and taken by fraud "in that they were manufactured without the consent of the copyright proprietors" (J.A. A7, A8), and the stipulated testimony concerning the value of the bootleg albums segregates a portion attributed to the copyrighted musical compositions (*id.* at A24-A33). As we discuss at pages 26-34, *infra,* we believe unauthorized copying, in violation of the rights of copyright proprietors and others with property interests in the material copied, is in itself sufficient to render the duplicates "stolen, converted or taken by fraud" within the meaning of Section 2314. However, the evidence to which petitioner stipulated on its face demonstrates alternative and indisputable grounds for characterizing the contents of the bootleg albums as stolen, converted or taken by fraud.

[25] In the case of the unreleased tapes that were stored by RCA or other recording companies, it is unclear from the evidence whether petitioner and his co-defendants obtained possession of the actual tapes that had been taken from company vaults or copies made from the original tapes. However, the record is clear that the custodians of the original tapes never authorized their release and did not permit access by unauthorized persons. See J.A. A22-A23, A34, A38-A39, A42-A43, A46. Even if the original tapes were never removed from company premises, but were copied by employees and returned to the vaults, there were original thefts of

plained above (pages 17-19), the fact that the sounds were transferred from one physical object to another should not permit a defendant to escape Section 2314 penalties. Thus, whether or not the property interests embodied in a copyright can be "stolen, converted or taken by fraud" by the act of unauthorized copying alone, the original thefts and fraudulent takings of the tapes and acetates are sufficient to render the contents of the bootleg albums transported by petitioner "stolen, converted or taken by fraud."

But even in cases in which there has been no original wrongful taking of a tangible object,[26] wrongful duplication of musical sounds or images would be grounds for characterizing the copies as "stolen, converted or taken by fraud." Each of the statutory terms—"stolen," "converted," and "taken by fraud"—is a broad one that connotes a wide range of wrongful takings. Thus, the terms "stealing" and "stolen" had no established meaning at common law and generally are not interpreted as confined to common-law larceny. See *Bell* v. *United States*, 462 U.S. at 360; *United States* v. *Turley*, 352 U.S. 407, 412 (1957); *Factor* v. *Laubenheimer*, 290 U.S. 276, 303 (1933). The term "conversion" is even broader than stealing. Conversion "may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to

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tangible items. See, *e.g.*, *United States* v. *DiGilio*, 538 F.2d 972, 976-978 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977). Cf. *Pearson* v. *Dodd*, 410 F.2d 701, 707-708 (D.C. Cir.), cert. denied, 395 U.S. 947 (1969).

[26] For example, a defendant could transport records or tapes that were manufactured by copying albums purchased at a record store. See *Goldstein* v. *California*, *supra*; *United States* v. *Drum*, *supra*. Alternatively, a defendant could transport records or tapes manufactured from a tape made by an audience member at a concert or from a recording of a television show. See, *e.g.*, *United States* v. *Smith*, *supra*; *United States* v. *Gallant*, *supra*; cf. *Sony Corp.* v. *Universal City Studios, Inc.*, No. 81-1687 (Jan. 17, 1984).

an unauthorized extent of property placed in one's custody for limited use." *Morissette* v. *United States*, 342 U.S. 246, 271-272 (1952). See also *United States* v. *DiGilio*, 538 F.2d 972, 978 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977). The term "taken by fraud" likewise is broad enough to encompass a variety of wrongful takings. The listing of all three terms in Section 2314 appears to represent a comprehensive reference to many sorts of misappropriation of property.

The courts have rejected a narrow reading of the terms "stolen, converted [and] taken by fraud." In *United States* v. *Turley*, 352 U.S. at 412-413, 416-417, this Court concluded that the term "stolen," as used in the National Motor Vehicle Theft Act, now codified at 18 U.S.C. 2312,[27] included any felonious taking of a motor vehicle with intent to deprive the owner of the rights and benefits of ownership, without regard to whether the theft constituted common-law larceny. The Court found that a broad interpretation of the term "stolen" would be consistent with the legislative purpose of eliminating interstate traffic in "unlawfully obtained motor vehicles" (352 U.S. at 417). The Court noted that "[p]rofessional thieves resort to innumerable forms of theft and Congress presumably sought to meet the need for federal action effectively rather than to leave loopholes for wholesale evasion" (*id.* at 416-417; footnote omitted).

The lower courts have followed a similar course in declining to limit Section 2314. They have concluded that Congress intended the phrase "stolen, converted or taken by fraud" to comprehend not only common-law larceny, but any criminal appropriation of another's property that deprives the owner of the rights and benefits of ownership. See, *e.g.*, *United States* v. *McClain*, 545 F.2d 988, 994-995, 1001 (5th Cir. 1977); *Lyda* v. *United States*, 279 F.2d 461, 463 (5th Cir. 1960); *Bergman* v. *United States*, 253 F.2d 933, 935 (6th Cir. 1958) (Stewart, J.)

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[27] Section 2314 was enacted as an extension of the National Motor Vehicle Theft Act. See pages 35-36, *infra*.

("[t]he issue as to whether the goods were obtained by one of the unlawful methods of acquisition referred to in [18 U.S.C. 2314 and 2315] is not to be decided upon the basis of technical common law definitions"); *United States* v. *Handler*, 142 F.2d 351, 353 (2d Cir.), cert. denied, 323 U.S. 741 (1944); *United States* v. *Sam Goody, Inc.*, 506 F. Supp. at 391 (terms should be interpreted "on a broad common-sense basis encompassing all forms of wrongfully depriving an owner of the possession or use of his property"); *United States* v. *Plott*, 345 F. Supp. 1229, 1231 (S.D.N.Y. 1972) ("the words 'stolen' and 'converted' cover a broad range of wrongful acts").

The terms "stolen" and "converted," as they are used in Section 2314, are broad enough to cover unauthorized copying from a sound recording. Such unauthorized copying constitutes misappropriation from those who have property interests in the recording. Once the sounds are embodied in a bootleg album, the album itself is fairly characterized as stolen or converted property for purposes of Section 2314.[28]

Property interests associated with a sound recording have several sources. Those who hold copyrights on the musical compositions performed (and, in the case of sound recordings fixed after February 15, 1972, those who hold a copyright on the sound recording itself, see pages 3-4 note 4, *supra*) have property interests that are protected by federal statute. See, *e.g.*, *American Tobacco Co.* v. *Werckmeister*, 207 U.S. 284, 290-291, 296-299 (1907). Those interests include the exclusive rights to duplicate and distribute the copyrighted work. 17 U.S.C. 106. State statutes, too, may create property in-

[28] In this case, as in the other Section 2314 cases that have involved unauthorized copying of sound recordings or motion pictures, there was actual rerecording, or transfer of sounds or images from one medium to another, in an attempt to reproduce precisely a particular performance. These cases thus involve more than mere use of a copyrighted composition to create a product containing an entirely new performance.

terests in a sound recording (at least to the extent such statutes are not preempted by the federal copyright laws). See *Goldstein* v. *California*, 412 U.S. at 571 (California "has, by statute, given to recordings the attributes of property"); *A & M Records, Inc.* v. *Heilman*, 75 Cal. App. 3d 554, 570, 142 Cal. Rptr. 390, 400 (1977), appeal dismissed and cert. denied, 436 U.S. 952 (1978); Cal. Penal Code § 653h (West Supp. 1985) (imposing penalties for unauthorized transfer of sounds from records or tapes with intent to sell). Finally, the courts have recognized certain common law property interests in sound recordings, including interests of artists in recordings of their own performances and interests of recording companies that have acquired the exclusive rights to manufacture and distribute recordings of particular performances. See, *e.g.*, *Lone Ranger Television, Inc.* v. *Program Radio Corp.*, 740 F.2d 718, 725 (9th Cir. 1984) ("Under California law, Lone Ranger TV would have an intangible property interest in the performances on tape from the time of their recording."); *Capitol Records, Inc.* v. *Mercury Records Corp.*, 221 F.2d 657, 662-663 (2d Cir. 1955) (literary property under New York law, in the form of exclusive right to manufacture and sell records of certain performances by highly gifted artists, was not lost by putting records on public sale); *A & M Records, Inc.* v. *Heilman*, 75 Cal. App. 3d at 570 (recorded performances constitute record company's intangible personal property); *Baez* v. *Fantasy Records, Inc.*, 144 U.S.P.Q. (BNA) 537, 539 (Cal. Super. 1964) (folk singer has common law property right in her musical interpretations, renditions and performances inscribed on audition tape); Cal. Civ. Code § 980(a)(2) (West Supp. 1985) (codifying state recognition of ownership rights in sound recordings fixed prior to 1972).[29]

[29] The amicus brief filed by the Recording Industry Association of America, Inc., in *Goldstein* v. *California*, *supra*, describes (at pages 21-26) additional cases in which unauthorized duplication of

Congress has viewed unauthorized duplication of recordings in violation of the copyright laws as the equivalent of stealing or conversion. When Congress in 1982 increased the penalties for copyright infringement involving piracy of sound recordings and audiovisual works, it included the new penalty provision, 18 U.S.C. 2319, in the chapter of Title 18 entitled "Stolen Property." See also S. Rep. 97-274, 97th Cong., 1st Sess. 6 (1981) (quoting Justice Department testimony that "[a]s compared to other theft and forgery statutes, penalties for copyright, piracy and counterfeiting are among the most lenient * * *"). The courts, too, have described copyright infringement in these terms. The Chief Justice, then a circuit judge sitting by designation in a case involving copyright infringement claims, noted that record piracy "might better be described by other terms connoting larceny." *Shapiro, Bernstein & Co.* v. *Remington Records, Inc.*, 265 F.2d 263, 269 (2d Cir. 1959) (Burger, J.). See also *Duchess Music Corp.* v. *Stern*, 458 F.2d 1305, 1311 (9th Cir.), cert. denied, 409 U.S. 847 (1972) (equating "outright appropriation, in violation of copyright, of the actual performances contained on appellants' records" with "steal[ing] the genius and talent of others").

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sound recordings has been found to implicate property interests under state law.

The protection of such property interests under state law generally is rooted in the recognition that artists and those in the recording industry who work with them to produce and sell recordings of their performances invest substantial effort, skill, and money and that legal protection of such investments is necessary in order to avoid discouraging invention and free competition. See, *e.g.*, *Capitol Records, Inc.* v. *Erickson*, 2 Cal. App. 3d 526, 537-538, 82 Cal. Rptr. 798, 805-806 (1969), cert. denied, 398 U.S. 960 (1970). That rationale is similar to the underpinnings of the rights created by the patent and copyright laws and the protection afforded to trade secrets and other fruits of competitive efforts. See, *e.g.*, *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 480-482 (1974); *Goldstein* v. *California*, 412 U.S. at 555; *International News Service* v. *Associated Press*, *supra*.

Courts that have addressed record and tape piracy in terms of interference with state statutory and common law rights likewise have referred to unauthorized copying as a form of stealing or conversion. In *Tape Industries Ass'n of America* v. *Younger*, 316 F. Supp. 340 (C.D. Cal. 1970), appeal dismissed, 401 U.S. 902 (1971), the three-judge court explained that record pirates "actually take and appropriate the product itself—the sounds recorded on the albums—and commercially exploit the product;" they are engaged in "selling for a reduced price another person's *stolen and appropriated product* for which the public customarily pays." *Id.* at 350 (emphasis added). The court went on to characterize California's imposition of criminal penalties for record and tape piracy as a "permissible state regulation directed against *theft* and appropriation of a saleable product," regardless of whether it was "deemed a *larceny* statute or an unfair competition law." *Id.* at 351 (emphasis added) See also, *e.g.*, *Lone Ranger Television, Inc.* v. *Program Radio Corp.*, 740 F.2d at 726 (upholding judgment awarding damages for conversion under California law based on unauthorized duplication and distribution of radio program tapes); *Tape Head Co.* v. *RCA Corp.*, 452 F.2d 816, 819 (10th Cir. 1971) (noting that 1971 amendment to federal copyright statute did not give plaintiffs a "right to convert and use these recordings with impunity prior to February 15, 1972" or to "appropriate the defendants' property, ideas and work" by copying musical recordings without authorization); *People* v. *Szarvas*, 142 Cal. App. 3d 516, 191 Cal. Rptr. 117, 123 (1983) (defendant who engaged in unauthorized duplication of sound recordings may properly be punished for either record piracy or theft); *A & M Records, Inc.* v. *Heilman*, 75 Cal. App. 3d at 570, 142 Cal. Rptr. at 400 (in case involving unauthorized recording and sale of performances, trial court correctly found that such "misappropriation and sale of the intangible property of another without authority from the owner is conversion"); *Capitol Records, Inc.* v. *Erick-*

son, 2 Cal. App. 3d 526, 537, 82 Cal. Rptr. 798, 805 (1969), cert. denied, 398 U.S. 960 (1970).[30]

[30] Actions against record and tape pirates are sometimes described in terms of unfair competition, as well as conversion or misappropriation. See, *e.g.*, *A & M Records, Inc.* v. *Heilman*, 75 Cal. App. 3d at 564, 570, 142 Cal. Rptr. at 396-397, 400.

While the original rule was that there could be no conversion of intangible rights, Prosser notes that "this hoary limitation has been discarded to some extent by all of the courts." W. Prosser, *Handbook of the Law of Torts* [hereinafter cited as *Prosser on Torts*] § 15, at 81 (1971). In addition to the record and tape piracy cases, see, *e.g.*, *National Surety Corp.* v. *Applied Systems, Inc.*, 418 So.2d 847 (Ala. 1982) (intangible personal property can be converted under Alabama law; no error in allowing conversion claim based on unauthorized copying of computer programs to go to the jury).

Petitioner cites this Court's reference to copyright infringement as a "trespass" on a copyright proprietor's right (*Sony Corp.* v. *Universal City Studios, Inc.*, slip op. 15) as an indication that unauthorized copying may never constitute conversion. The Court did not use the term "trespass" in a technical sense; moreover, the reference is hardly inconsistent with characterization of copyright infringement as a form of theft. See *Bell* v. *United States*, 462 U.S. at 358 (larceny formerly "was limited to trespassory taking"). It is worth noting that *Sony* involved small scale copying for home use, a very different activity from the massive amounts of unauthorized copying for commercial purposes that occurred in the course of petitioner's bootleg operation.

Petitioner also cites (Br. 27-28) two lower court cases for the proposition that copyright infringement cannot constitute conversion. *Local Trademarks, Inc.* v. *Price*, 170 F.2d 715, 718 (5th Cir. 1948); *King Brothers Production, Inc.* v. *RKO Teleradio Pictures, Inc.*, 208 F. Supp. 271, 277 (S.D.N.Y. 1962). Both cases involved the choice of an analogous state statute of limitations in a civil copyright infringement action; in each case the court concluded that under applicable state law (Alabama and California respectively) intangible property could not technically be the subject of an action for conversion and that copyright infringement instead sounded in tort. Petitioner also cites *Porter* v. *United States*, 473 F.2d 1329, 1337 (5th Cir. 1973), in which the court concluded that an action by the widow of Lee Harvey Oswald for alleged infringement by the government of her common law copyright in his writings could not be a "taking" for constitutional purposes but only a tort. The significance of these cases is unclear, since conversion is often regarded as a tort. See *Prosser on Torts*, *supra*, § 15, at 79.

Against this background, it is not surprising that (with the exception of the Fifth Circuit in *United States* v. *Smith*, *supra*) all of the courts that have considered the issue have concluded that unauthorized copying by record and tape pirates and bootleggers may constitute stealing or conversion for the purposes of Section 2314. See, *e.g.*, *United States* v. *Drum*, 733 F.2d at 1506 (noting that "defendants' activities constituted use of copyrighted property in an unauthorized manner"); *United States* v. *Belmont*, 715 F.2d at 462 (coverage of Section 2314 should not be restricted simply because "thieves devise new ways of appropriating * * * property to their own use"); *United States* v. *Drebin*, 557 F.2d at 1332 ("illicit copying of a copyrighted work is no less a 'theft, conversion or taking by fraud' than if the original were so taken"). The court in *United States* v. *Sam Goody, Inc.*, *supra*, explained why, under a common sense approach, the making of unauthorized duplicates of copyrighted musical works easily qualifies as stealing, converting, or taking by fraud: "Such conduct most closely resembles traditional conversion, in that it involves the unauthorized appropriation of property belonging to another party after the property had been lawfully given to the infringer for a limited use, and the requisite intent on the part of the infringer to put the property to his own use and for his own benefit." 506 F. Supp. at 391.

Petitioner cites dictionary definitions of the terms "steal," "conversion," and "take" in support of his claim that his conduct fell outside the scope of Section 2314. Pet. Br. 30-31. But the definitions he quotes all include references to taking or exercise of the rights of ownership of "personal property," "goods," or "chattels" of another. As we explained at page 24, *supra*, dictionary definitions themselves establish that these terms are not confined to tangible property. See also *Black's Law Dic-*

In any event, Congress appears to have used the term "converted" in a less technical sense than the sense in which it is used for purposes of determining applicable state statutes of limitations.

tionary, supra, at 300 (defining "conversion" to include "[u]nauthorized and wrongful exercise of dominion and control over another's personal property, to exclusion of or inconsistent with rights of owner"); *id.* at 1272 (defining "stolen" to mean "[a]cquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently"); *id.* at 1303 (defining "take" as, inter alia, "to appropriate things to one's own use with felonious intent"). Nothing in these broad definitions shows that the statutory terms exclude wrongful takings in the form of unauthorized copying of musical sounds for use in the manufacture of bootleg albums.[31]

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[31] *United States* v. *Carman,* 577 F.2d 556 (9th Cir. 1978), and *United States* v. *Long Cove Seafood, Inc.,* 582 F.2d 159 (2d Cir. 1978), cited by petitioner (Br. 29, 30), do not support his contentions. In those cases, the courts rejected the application of Section 2314 because there was insufficient evidence of ownership of the property at issue. In *Carman* the court concluded that a debtor who had placed money outside the reach of his company's general creditors had not engaged in stealing for purposes of Section 2314, because stealing requires a taking from one having the attributes of an owner. 577 F.2d at 565. In *Long Cove* the court rejected the contention that Section 2314 applied to the taking of clams in violation of state environmental conservation laws without a showing of "some sort of interference with a property interest." 582 F.2d at 163. In this case, both the initial takings of the unreleased sound recordings and the unauthorized duplication of sounds from those recordings clearly interfered with the property interests of others.

If the Court should reject our contention that unauthorized copying from a sound recording in violation of the rights of copyright proprietors or others is alone sufficient to render the duplicates "stolen, converted or taken by fraud" within the meaning of Section 2314, it nevertheless seems clear that this case involved other activities—the wrongful takings of the tapes and acetates from which the contents of the bootleg albums were duplicated—that bring petitioner's shipments within the scope of the statute. See pages 15-19, 25-26 & note 24, *supra.*

B. Interpretation Of Section 2314 To Cover Interstate Shipments Of Bootleg Record Albums is Consistent With The Legislative Purposes Underlying The Statute

The legislative history of Section 2314 demonstrates that Congress's underlying purpose in enacting that provision was to provide comprehensive protection for owners of stolen property. In particular, Congress wished to reach criminals who previously had escaped prosecution by moving stolen property from the jurisdiction where the theft occurred to the jurisdiction of a different sovereign. Interpretation of Section 2314 to cover petitioner's interstate shipments of bootleg albums would further these legislative purposes.

1. Section 2314 was enacted as an extension of the National Motor Vehicle Theft Act (also known as the Dyer Act), the predecessor to 18 U.S.C. 2312. In 1919, Congress legislated against the background of an epidemic of automobile thefts, particularly in areas contiguous to state lines. Thieves would transport stolen vehicles across state lines in order to conceal or dispose of them and to escape liability by fleeing the law enforcement authorities of the jurisdiction where the theft had taken place. See 58 Cong. Rec. 5474-5475 (1919) (remarks of Rep. Newton). The House committee stressed that "[t]he losses to the people of the United States by reason of this stealing amounts [sic] to hundreds of thousands of dollars every year." H.R. Rep. 312, 66th Cong., 1st Sess. 1 (1919).

In explaining the new legislation, the House committee emphasized the broad constitutional power of Congress. The committee observed that the purpose of the Commerce Clause was "to regulate and promote the freedom of commercial intercourse * * *. To render intercourse commerce there must be present the element of transportation. Transportation is essential to commerce, * * * and *the commodities transported may be tangible or intangible.* Neither are they limited to those known at the time of the adoption of the Constitution." H.R. Rep. 312,

supra, at 3 (emphasis added). Congress clearly did not view its authority in this field as limited to property in any narrow, traditional sense; rather, transportation in commerce could extend to both tangible and intangible commodities.[32] Congress's real concern was to prevent stolen property from moving in interstate commerce. "No good reason exists why Congress * * should not provide that such commerce [among the states] should not be polluted by the carrying of stolen property from one State to another." *Id.* at 4.

2. In 1934, Congress enacted the National Stolen Property Act, now Section 2314, in order "[t]o extend the provisions of the National Motor Vehicle Theft Act to other stolen property." Ch. 333, 48 Stat. 794 *et seq.*[33] The 1934 statute was introduced as a bill to extend the National Motor Vehicle Theft Act "to cover *all* property, with certain limitations as to value." 78 Cong. Rec. 2947 (1934) (emphasis added). Senator Ashurst listed the proposed extension as one of a group of "antigangster bills." *Id.* at 2946-2947. At the time he introduced these bills, Senator Ashurst submitted a letter from the Attorney General explaining that the proposed legislation was a response to the growth of certain types of crime perpetrated by groups of gangsters whose activities were

[32] The House Committee did observe that automobiles were tangible property. H.R. Rep. 312, *supra*, at 4. However, there is no suggestion that the observation was meant to limit the reach of subsequent legislation; the committee merely used this point to emphasize that automobiles were articles capable of being transported in commerce and were therefore a proper subject of Congress's attention.

[33] At the time of its initial enactment in 1934, the National Stolen Property Act provided in pertinent part (§ 3, 48 Stat. 794-795):

> Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen or taken, shall be punished * * *.

not confined to any particular locality and who, in accordance with organized plans, moved across state lines to take advantage of the limited jurisdiction and lack of central coordination of law enforcement efforts of the states. The new legislation was intended to eradicate crimes committed by "[t]he roving criminal [who] exists and thrives by seizing the advantages of scientific improvements." *Id.* at 2947.[34]

The Senate report, the House report, and the conference report all referred to the new legislation as an extension of the National Motor Vehicle Theft Act "to other stolen property," without any indication of a limitation on the type of property covered, other than the $5,000 minimum value requirement. S. Rep. 538, 73d Cong., 2d Sess. 1 (1934); H.R. Rep. 1462, 73d Cong., 2d Sess. 1 (1934); H.R. Rep. 1599, 73d Cong., 2d Sess. 1, 3 (1934). See also H.R. Rep. 1462, *supra*, at 2 (bill "is designed to punish interstate transportation of stolen property, securities, or money"). Congress's choice of the terms "goods, wares, or merchandise, securities, or money" reflected its decision to consolidate one set of bills (S. 2251 and H.R. 6919) addressing "goods, wares or merchandise," a second set of bills addressing "securities of every description" (S. 2250 and H.R. 6914), and the Attorney General's suggestion that "money" be added. S. Rep. 538, *supra*, at 1-2.[35] It is reasonable to assume that Congress believed that in combining all of the terms used in the

[34] In a memorandum reproduced in the Senate report, the Department of Justice noted that proposed legislation imposing federal criminal penalties for interstate transportation of stolen property had failed in 1926 and 1930 because of congressional concern that it would burden federal law enforcement resources that were already strained as a result of the Dyer Act. S. Rep. 538, 73d Cong., 2d Sess. 2 (1934). In response to that concern, the 1934 legislation limited coverage by imposing a $5,000 minimum value. See *ibid.*; H.R. Rep. 1462, 73d Cong., 2d Sess. 2 (1934).

[35] The Attorney General also suggested coverage of interstate transportation of "counterfeits," but such a provision was not added until 1939, when the statute was amended to reach transportation of counterfeited securities. See note 36, *infra*; S. Rep. 538, *supra*, at 2.

different legislative proposals it would accomplish the purpose stated in the legislative history—extension of the National Motor Vehicle Theft Act to "all other property."

The 1934 statute referred to property "theretofore stolen or taken feloniously by fraud or with intent to steal or purloin." § 3, 48 Stat. 794. In 1939, Congress added the words "feloniously converted," in order to extend coverage to "embezzled property, securities and money." Act of Aug. 3, 1939, ch. 413, § 1, 53 Stat. 1178; H.R. Rep. 422, 76th Cong., 1st Sess. 1 (1939); see also S. Rep. 674, 76th Cong., 1st Sess. 1 (1939) (statute amended "[t]o include embezzled as well as stolen property").[36]

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[36] At the same time, Congress extended the Act to cover transportation of counterfeit securities and counterfeiting instruments and tools, without regard to any monetary limit. Congress presumably believed that counterfeit securities could not be described as "stolen" or "taken feloniously by fraud," since they are manufactured by engraving a plate and producing certificates that purport to be unique, rather than by transferring information of value from some genuine item. See S. Rep. 674, *supra*, at 2. A counterfeit security is therefore different from a pirated, counterfeit, or bootleg recording, which is made by unauthorized transfer of valuable sounds and which has value because it embodies a precise duplicate of the original sounds.

Section 2314 assumed its present form in 1948 and 1949, when the federal criminal code was revised. No substantive changes were made at that time. See H.R. Rep. 304, 80th Cong., 1st Sess. A146 (1947); H.R. Rep. 352, 81st Cong., 1st Sess. 1, 9 (1949). In 1956, Congress added a section penalizing transportation of persons in connection with confidence game swindles. Act of July 9, 1956, ch. 519, 70 Stat. 507. In 1961, a reference to fraudulent tax stamps was added. Pub. L. No. 87-371, 75 Stat. 802 *et seq.* And in 1968 Congress added a new paragraph prohibiting the transportation of traveler's checks bearing forged counter-signatures. Pub. L. No. 90-535, 82 Stat. 885. The latter amendment was made in response to *Streett* v. *United States*, 331 F.2d 151 (8th Cir. 1964), which held that the statutory reference to forged securities signified only forgery in the making or execution of an instrument and not forgery of a signature on a validly executed instrument. Both the Senate and House committees noted that they had been advised by an industry source that organized crime gangs were involved in the theft and cashing of traveler's checks. S. Rep. 637, 90th Cong., 1st Sess. 2 (1967); H.R. Rep. 1728, 90th Cong., 2d Sess. 2 (1968).

Interpretation of Section 2314 to cover interstate transportation of bootleg record albums is entirely consistent with Congress's intent to create a comprehensive and effective law enforcement tool that could be used to combat the efforts of "roving criminals." There was evidence in this case that petitioner and Theaker shipped the albums to the East Coast in order to escape detection by law enforcement authorities in California (see page 6, *supra*)—precisely the sort of activity Congress intended to reach when it enacted Section 2314. A contrary reading of the statute would frustrate legislative intent by immunizing from Section 2314 coverage numerous illicit interstate shipments that cause extensive damage to legitimate commercial enterprises in the entertainment industry. Individuals who traffic in millions of dollars worth of pirated or bootleg recordings could ship such materials over state lines without fear of incurring Section 2314 penalties. As in the case of the National Motor Vehicle Theft Act, Congress was aware that "[p]rofessional thieves resort to innumerable forms of theft" and "presumably sought to meet the need for federal action effectively rather than to leave loopholes for wholesale evasion." *United States* v. *Turley*, 352 U.S. at 416-417 (footnote omitted).

It is most unlikely that Congress would have intended to leave a loophole for interstate shipments of pirated and bootleg records, particularly in view of the major role played by organized crime in this area. A 1980 report by the Attorney General concluded that "[t]here is evidence that organized crime is becoming increasingly involved as a major supplier of counterfeit [films and recordings]." *National Priorities for the Investigation and Prosecution of White Collar Crime: Report of the Attorney General* 28 (1980). And in its 1981 report accompanying amendments to the federal copyright statute, the Senate Judiciary Committee noted that "[t]he tremendous profits to be made, plus the need for sophisticated technology and large amounts of capital, make counterfeiting [of films and recordings] a logical activity for organized crime." S. Rep. 97-274, 97th Cong., 1st Sess. 5 (1981). The com-

mittee described testimony it had heard concerning the increasing role of organized crime in record and tape piracy:

> In the last three years, the mafia has become one of the biggest producers of records and tapes in this country, turning out millions of copies of the hits on the Top 20 list.
>
> The mob's first big hit was the music from the soundtrack of the movie, "Saturday Night Fever" featuring the Bee Gees. RSO records, the company that made the original legal recording, says it sold 23 million copies of the soundtrack from "Saturday Night Fever." Federal investigators say mob counterfeiters made and sold at least that many.

Id. at 5-6 (footnote omitted).

As we discussed above, a major impetus for the 1934 passage of the legislation that is now Section 2314 was Congress's perception of a compelling need for weapons to combat the interstate activities of organized crime (then more colloquially referred to as "gangsters"). Today organized crime has expanded the scope of its activities to include manufacture, interstate shipment, and sale of massive numbers of unauthorized copies of sound recordings and motion pictures. Interpretation of Section 2314 to encompass the interstate transportation aspect of what has become one of organized crime's major commercial enterprises clearly would further the original congressional intent.[37]

3. Petitioner, like the Fifth Circuit in *Smith* (686 F.2d at 246-249), relies heavily on recent amendments to

[37] The Fifth Circuit in *Smith* found it significant that the 1934 legislative history included no reference to copyright or misappropriation by means of unauthorized copying. 686 F.2d at 246. Congress's silence is hardly surprising in view of the fact that the technology necessary to accomplish this type of theft on a commercial scale had not been developed at that time. See pages 3-4 note 4, *supra*. Cf. *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390, 395 (1968) (in considering application of 1909 copyright statute to cable television, the "inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here").

the federal copyright statute to support the claim that Congress did not intend Section 2314 to reach individuals who engage in copyright infringing activities. Pet. Br. 33-37. He cites Congress's decision not to enact felony penalties for copyright infringement as part of the comprehensive revision of the copyright statute in 1976 and its eventual decision in 1982 to impose such penalties for serious piracy and counterfeiting activities.[38] In petitioner's view, the latter legislation, the Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, 96 Stat. 91 *et seq.*, demonstrates that Congress did not believe that the felony penalties of any other statute, including Section 2314, applied to activities involving copyright infringement prior to 1982. In fact, an examination of the legislative history shows that Congress was aware, and expressed approval, of application of Section 2314 in this area.

Petitioner cites nothing in the legislative history of the 1982 amendments that provides any direct support for his contention. Members of Congress and a Department of Justice spokesperson who advocated passage of the

[38] Petitioner points to nothing in the legislative history of the 1976 copyright statute that would indicate that Congress believed that interstate shipments like those made by petitioner could not form the basis for a Section 2314 prosecution. The court in *Smith* (686 F.2d at 247; see also Pet. Br. 33-34) found it significant that in 1975 the president of the Motion Picture Association of America testified in favor of felony treatment for copyright infringement involving film piracy and false labeling. See *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. Pt. 2, at 716 (1976) (testimony of Jack Valenti). There is no indication in that testimony (which focused primarily on the separate issue of cable television) that the MPAA believed that felony treatment might not be available under Section 2314; presumably it was simply recommending an additional enforcement tool that would address the piracy problem more directly. Congress may have declined to add felony provisions to the many other changes it made in 1976 simply because at that time it believed that Section 2314 and other penalties applicable to piracy and counterfeiting activities were sufficient to address the problem.

1982 legislation did express the view that an increase in the penalties for copyright infringement was essential to deter large-scale piracy of sound recordings and motion pictures and that existing misdemeanor penalties had done little to stop these particularly lucrative activities. See 128 Cong. Rec. H1951 (daily ed. May 10, 1982) (remarks of Rep. Kastenmeier); *The Piracy and Counterfeiting Amendments Act of 1981: Hearings on S. 691 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 8 (1981) [hereinafter *The Piracy and Counterfeiting Amendments Act of 1981—S. 691*] (statement of Renee L. Szybala, Special Assistant to the Associate General ~~Counsel~~). But it is hardly surprising that those who were recommending an increase in the penalties for copyright infringement were emphasizing the inadequacy of penalties for that offense, rather than calling attention to the possibility of prosecutions under other statutes. Moreover, felony penalties for copyright infringement may have been regarded as a needed complement to penalties available under other statutes. A statute like Section 2314 addresses only one stage of a piracy operation (*i.e.*, the transportation of large quantities of pirated materials over state lines); and Section 2314 may present certain difficulties of proof that do not exist in a copyright infringement case, *e.g.*, the requirement that goods transported have a value of $5,000 or more, or the problem of establishing complicity by all of the infringers in the transportation itself. Congress could reasonably have concluded that, despite the existence of other applicable statutes, an increase in penalties for copyright infringement was also needed for fully effective deterrence of illegal conduct at the most significant stages of a piracy or counterfeiting operation.[39]

[39] Cf. the legislative history of 18 U.S.C. 2318, which penalizes, inter alia, interstate transportation of phonorecords bearing counterfeit labels. At the time Section 2318 was initially considered, the Justice Department advised Congress that it was unaware of any federal statute dealing "directly" with the problem of record counterfeiting or "bootlegging." S. Rep. 2154, 87th Cong., 2d Sess. 8 (1962) (letter from Byron R. White, Deputy Attorney General, to Hon. James O. Eastland, Chairman of the Senate Judiciary Committee). Of course, Section 2314 does not deal "directly" with the record counterfeiting problem; moreover, it is unclear whether in 1962 record counterfeiting normally involved interstate shipments with a value of more than $5,000, so that the Justice Department would have considered the possibility of prosecution under Section 2314.

The legislative history of the 1982 amendments indicates affirmatively that Congress was aware of the government's use of Section 2314 to prosecute those who made large shipments of pirated materials. The Senate Judiciary Committee noted that a series of FBI raids had led to the indictment of Sam Goody, Inc., for the purchase and sale of over $1 million in counterfeit recordings. S. Rep. 97-274, 97th Cong., 1st Sess. 3 (1981). The indictment to which the committee referred included several counts charging Sam Goody with violations of Section 2314 in connection with shipment of the recordings.[40] And during hearings before a Senate subcommittee, a representative of several industry groups presented a statement that referred to prosecutions of individuals who had shipped large quantities of pirated tapes and films, including the prosecutions in *United States* v. *Smith*, *supra*, and *United States* v. *Drebin*, 557 F.2d 1316 (9th Cir. 1977), cert. denied, 436 U.S. 904 (1978), both of which included Section 2314 counts. *The Piracy and Counterfeiting Amendments Act of 1981—S. 691*, *supra*, at 37 & n.5 (prepared statement of the Motion Picture Association of America, Inc., and the Recording Industry Association of America, Inc.). The industry groups pointed out (*id.* at 56 n.23) the drawbacks of provisions like Section 2314, noting that the scaling of penalties for copyright infringement according to quantity of infringing works was preferable to the "value" approach of other theft provisions, because

[40] Almost a year before the Senate report was issued, the district court declined to dismiss those Section 2314 counts in response to arguments similar to those advanced by petitioner in this case. See *United States* v. *Sam Goody, Inc.*, 506 F. Supp. at 385-391.

there were difficulties involved in assigning a value to illegal reproductions.

The industry groups had been even more explicit several years earlier when they submitted joint statements in support of proposed revisions to the federal criminal code that (like the legislation eventually enacted in 1982) would have brought the offense of criminal copyright infringement into Title 18 and classified that offense as a felony. In their statements the industry groups noted that, because of the modest penalties for criminal copyright infringement, indictments of record and tape pirates and counterfeiters had focused, "when possible, on related criminal offenses—such as mail fraud, wire fraud, ITSP (Interstate Transportation of Stolen Property), RICO (Racketeer-Influenced Corrupt Organizations) and even customs violations," rather than on copyright infringement and counterfeiting. *Reform of the Federal Criminal Laws: Hearings on S. 1722 and S. 1723 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. Pt. 14, at 10699 (1979); *Revision of the Federal Criminal Code: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. Pt. 5, at 4130 (1979). The industry groups noted that in past cases there had been difficulties in establishing the value of unauthorized reproductions for purposes of the theft provisions of the criminal code, citing two cases in which individuals engaged in piracy had been charged with violations of Section 2314, *United States* v. *Atherton*, 561 F.2d 747 (9th Cir. 1977), and *United States* v. *Wise*, 550 F.2d 1180 (9th Cir.), cert. denied, 434 U.S. 929 (1977). *Reform of the Federal Criminal Laws*, *supra*, at 10700 n.9; *Revision of the Federal Criminal Code*, *supra*, at 4132 n.8.

The legislative history thus shows that Congress was made aware in both 1979 and 1981 that Section 2314 was being used to prosecute individuals who made interstate shipments in connection with large-scale copyright infringing activity. On neither occasion did it express disapproval of such prosecutions. Indeed, in the statute itself Congress appears to have expressed affirmative approval of the use of Section 2314 to reach piracy and counterfeiting operations. When Congress finally enacted the 1982 legislation adding felony penalties for certain types of copyright infringement involving piracy and counterfeiting, it provided that the new penalties "shall be in addition to any other provisions of title 17 *or any other law*." 18 U.S.C. 2319(a) (emphasis added). See also S. Rep. 97-274, *supra*, at 2 (1982 legislation "is intended to supplement existing remedies contained in the copyright law or any other law"). It seems clear that the phrase "or any other law" refers at least to those criminal statutes, such as Section 2314, that previously had been used to prosecute individuals involved in piracy and counterfeiting operations. See *United States* v. *Gottesman*, 724 F.2d at 1521 ("any other law" language "effectively ratifies the earlier practice of prosecuting willful copyright infringers under 18 U.S.C. § 2314"); *United States* v. *Belmont*, 715 F.2d at 462.[41]

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[41] Petitioner contends (Br. 34-35) that this statutory provision was added only to make clear that certain remedies provided by Title 17 would continue to be available. That reading would render the phrase "any other law" meaningless—a result contrary to established principles of statutory construction. See, *e.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979).

Even if petitioner's bootlegging activities had occurred after 1982, any prosecution for copyright infringement might have involved only misdemeanor violations. Under 18 U.S.C. 2319(b), felony penalties may be imposed only on those who infringe copyrights in sound recordings, motion pictures, or other audiovisual works; the increased penalties do not apply to those who infringe only a copyright in a musical composition. Many of the Presley recordings that constituted the source material for the bootleg albums in this case were fixed before 1972, the year when Congress extended copyright protection to sound recordings. See pages 3-4 note 4, *supra*.

If petitioner's bootlegging operation had continued after 1982, it is possible that the government could have prosecuted him under 18 U.S.C. 2318, which imposes felony penalties for trafficking in counterfeit labels in certain circumstances, including when the mail is used in commission of the offense. The evidence in the record (see, *e.g.*, J.A. A15; Deary Stiptest. 30-47) suggests that petitioner

C. The Fact That Petitioner's Bootlegging Operation Included Copyright Infringing Activities Does Not Immunize Him From Prosecution Under Section 2314 For His Interstate Shipments Of Bootleg Record Albums

Petitioner's central contention in his opening brief is that, since manufacture and ultimate distribution of the bootleg albums involved copyright infringement, he should be subject only to the misdemeanor penalties of the pre-1982 copyright laws, not to felony penalties under any other criminal statute he may have violated in the course of the bootlegging operation. Petitioner has produced no direct evidence that Congress wished copyright infringement penalties to constitute the exclusive law enforcement weapon against record and tape piracy and bootlegging activities; indeed, as we argued in the preceding section, Congress's express preservation of penalties under "any other law" when it amended the copyright statute in 1982 suggests the contrary conclusion.

In any event, petitioner's contention is at odds with common sense. Piracy and bootlegging operations involve a whole series of steps, beginning with acquisition and unauthorized duplication of source material and ending with distribution of the unauthorized copies to retail customers. Different individuals may participate at different stages of an operation. There is no logical reason for Congress to have concluded that the occurrence of copyright infringing acts at some stages (*e.g.*, copying and ultimate distribution) should insulate the participants from prosecution for other crimes they may commit in the course of the enterprise, including interstate shipments of infringing copies embodying stolen or converted property interests prior to ultimate distribution.

The underlying assumption of petitioner's argument is that the criminal copyright provisions and Section 2314 address the same conduct. Even if this were so, the

arranged for the production of album covers and labels that appeared to be genuine and that the bootleg albums were sold with these counterfeit labels and covers.

government could proceed under both statutes. See *Ball* v. *United States*, No. 84-5004 (Mar. 26, 1985), slip op. 4-5 & n.7; *United States* v. *Batchelder*, 442 U.S. 114, 123-124 (1979). In fact, the two provisions are aimed at very different conduct. The copyright statutes penalize reproduction or distribution of copyrighted material without the consent of the copyright proprietor (or, in the case of compulsory licensing, without notifying and paying royalties to the copyright proprietor). There is no requirement of transportation in interstate commerce. Nor is there any minimum volume of infringing activity that must occur in order for penalties to attach.[42] Section 2314, on the other hand, specifically requires transportation in interstate commerce; and the "goods, wares, [or] merchandise" transported must have a value of at least $5,000. Section 2314 may be violated without any act of copyright infringement. The fact that petitioner was prosecuted under both statutes simply reflects a commonplace of modern federal criminal law—a particular transaction or operation may entail violations of two different statutes because it satisfies distinct elements of each offense. See *Albernaz* v. *United States*, 450 U.S. 333, 337-342 (1981); *Gore* v. *United States*, 357 U.S. 386, 388-391 (1958); *Blockburger* v. *United States*, 284 U.S. 299 (1932).

In some situations, property that is transported across state lines may infringe a copyright because, *e.g.*, sounds were copied and compositions used without the consent of a copyright proprietor. As we have argued above (pages 26-34), such property is "stolen" or "converted" for the purposes of Section 2314 because its manufacture involves a misappropriation in violation of the rights of others, including the copyright proprietor. But in such a case the conduct penalized by Section 2314 is not the act of copyright infringement (*i.e.*, the unauthorized copying); rather, it is the entirely separate act of transporting

[42] The availability of the felony penalties enacted in 1982 depends on the reproduction or distribution of certain minimum numbers of infringing copies. See 18 U.S.C. 2319(b).

stolen property worth $5,000 or more in interstate commerce. In any Section 2314 case, there will have been some earlier crime involving, *e.g.*, larceny or fraud, that may or may not have been committed by the Section 2314 defendant. It has never been suggested that prosecutors are confined to charging the earlier crime. Indeed, Congress's creation of the Section 2314 offense would have been meaningless if the possibility of prosecution for the earlier crime were to negate the application of Section 2314.[43]

This case illustrates the differences between copyright infringement and conduct that violates Section 2314. Petitioner was charged with nine counts of infringing copyrights "by distributing to the public by sale phonorecords containing performances of * * * musical compositions or copies of the soundtracks of * * * audiovisual works, without the consent of the copyright proprietors" (J.A. A8). The copyright counts were based on two mailings of bootleg albums to customers located in California; each of these transactions involved less than $200 worth of albums. See Lefebre Stiptest. 68; Preston Stiptest. 85. The Section 2314 counts related to a different stage of the bootlegging operation—petitioner's truck shipments (each with a total worth of considerably more than $5,000) of bootleg albums from the West Coast to the East Coast, prior to storage on the East Coast and ultimate distribution to customers.[44] As we have shown in

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[43] In many instances the original theft will have violated only state law, but it seems clear that Section 2314 applies fully even if, *e.g.*, that theft occurred in a federal enclave or involved federal property, so that it would be subject to federal prosecution apart from the interstate transportation. See *United States* v. *Kalsbeck*, 625 F.2d 123 (6th Cir.), cert. denied, 449 U.S. 904 (1980); *United States* v. *Stearns*, 550 F.2d 1167, 1172 (9th Cir. 1977); *United States* v. *Marzano*, 537 F.2d 257, 273 (7th Cir. 1976), cert. denied, 429 U.S. 1038 (1977).

[44] In some cases, interstate transportation of large quantities of copyright infringing materials might constitute a violation of both Section 2314 and the copyright laws. This would occur when the shipment constituted distribution of the copies "to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. 106(3). Here petitioner in effect shipped the bootleg albums to himself or one of his co-conspirators; thus, the shipments presumably did not involve distribution within the meaning of the copyright laws.

the preceding sections, the language and legislative history of both Section 2314 and the copyright statute support the conclusion that Congress intended Section 2314 to apply to such interstate shipments.[45]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[45] Petitioner's suggestion (Br. 38-39) that, even if Section 2314 could be interpreted to cover his conduct, that reading of the statute would violate his right to fair warning that his actions were of a criminal nature is frivolous. Petitioner clearly was aware that he was not engaged in innocent activity. He played a major role in a bootlegging operation of very substantial magnitude, directing the interstate shipment of hundreds of thousands of dollars worth of bootleg recordings. Petitioner explicitly acknowledged to his business associates that he knew that his activities were illegal and that he was wary about making interstate shipments that exceeded a value of $5,000. See page 16 & note 14, *supra*.

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